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MOTION FILED

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No. 06-1345

IN THE

SUPREME COURT OF THE UNITED STATES

MiPRO HOMES, L.L.C. and
BUILDERS LEAGUE OF SOUTH JERSEY, INC.,
Petitioners,

v.

MOUNT LAUREL TOWNSHIP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF AVALONBAY COMMUNITIES, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2, AvalonBay Communities, Inc. of Alexandria, Virginia, ("AvalonBay"),[1] a publicly-owned real estate investment trust and one of the nation's largest developers, owners, and managers of rental apartment housing, respectfully moves for leave from this Court to file the attached brief as *amicus curiae* in support of the Petitioner's request for a writ of certiorari. None of the parties have consented to the filing of this or any other brief *amicus curiae.*

In Connecticut, AvalonBay frequently develops residential apartment communities by availing itself of Connecticut's "affordable housing" statute, Conn. Gen. State. §8-30g. This statute provides that when a municipal zoning commission denies a residential development in which the developer agrees to set aside thirty percent of its proposed units at rents that are within the economic means of low and moderate income families, and the developer appeals that denial to court, the burden of proof on appeal shifts to the commission to prove that each reason for denial is a "substantial public interest" implicating health or safety and "clearly outweighs" the regional need for affordable housing. The statute is, therefore, a mechanism for overriding exclusionary zoning ordinances, a state-mandated reduction of local authority to dictate land use, and in many cases, controversial and unpopular among local officials and residents.

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. The brief was not written in whole or part by counsel for a party, and no one other than amicus made monetary contribution to its preparation.

As a result, in Connecticut, in several instances, municipalities have turned to eminent domain in order to preempt or avoid development applications brought under §8-30g, in order to avoid both its burden-shifting mechanism and perceived adverse impacts of low and moderate income households. AvalonBay has been the condemnee in two such cases, in the Town of Orange: *AvalonBay Communities v. Town of Orange*, 775 A.2d 284 (Conn. 2001) and *AvalonBay Communities v. Town Plan and Zone Commission*, 796 A.2d 1164 (Conn. 2002); and in the Town of Darien: *Town of Darien v. Estate of D'Addario*, 784 A.2d 337 (Conn. 2001). The Darien case was settled, but in Orange, AvalonBay obtained a permanent injunction to prevent the town from using eminent domain to stop its proposed residential, affordable development.

AvalonBay continues to develop in Connecticut, including under §8-30g. It also develops in New Jersey. Particularly in light of this Court's affirmation of the eminent domain power in *Kelo v. New London*, 545 U.S. 469 (2005), municipalities sometimes turn to eminent domain to ward off what they view as undesirable residential development. As such, AvalonBay has a direct and substantial interest in the Question Presented in the Petition.

Through the attached brief *amicus curiae*, AvalonBay wishes to (1) bring to this Court's attention the fact that the Connecticut courts, interpreting the public use requirement of the Takings Clause of the Fifth Amendment and the parallel provision of the Connecticut Constitution, have held that eminent domain must be based upon a public planning process, and that a government's proffer of a pretextual reason for using eminent domain

constitutes bad faith that invalidates the government's action; (2) point out that Connecticut's interpretation of the Takes Clause is thus substantially different from that of the New Jersey courts in the case at issue in the instant Petition; (3) explain how New Jersey's interpretation of the Fifth Amendment undermines what protection from eminent domain abuse is left to condemnees after *Kelo*; and (4) urge this Court to grant the Petition in order to resolve the split between Connecticut and New Jersey and among the other cases noted in the Petition, and to clarify procedural requirements and limitations that attend the exercise of eminent domain.

Dated: May 4, 2007

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ARGUMENT

THE CONNECTICUT AND NEW JERSEY COURTS, AMONG OTHERS, ARE SPLIT AS TO WHETHER THE FIFTH AMENDMENT TAKINGS CLAUSE REQUIRES THAT EMINENT DOMAIN BE BASED ON A PLANNING PROCESS AND CARRIED OUT WITHOUT PRETEXT, AND THIS COURT SHOULD RESOLVE THE SPLIT.

A. In Connecticut, Eminent Domain Must Be Based on a Plan, and Government's Reason For Condemnation Must Not Be Pretextual.

The Connecticut Supreme Court has held that it considers the takings provision of the Connecticut Constitution, Article I, §11,[2] to provide the same rights and to be subject to the same limitations as the Takings Clause of the Fifth Amendent. *See, e.g., Santini v. Conn. Hazardous Waste Management Service,* 739 A.2d 680, at 688, n.20 (Conn. 1999), *cert. denied,* 530 U.S. 1225 (2000); *Cumberland Farms v. Town of Groton,* 808 A.2d 1107, 1124-31 (Conn. 2002). Moreover, Connecticut has recognized that this Court's interpretations of provisions of the Bill of Rights furnish a minimum standard for interpretation of parallel state constitutional provisions. *See, e.g., State v. Geisler,* 610 A.2d 1225, 1231-32 (Conn. 1992).

Interpreting the public use requirement of the federal and state takings clauses, the Connecticut courts have held that the use of eminent domain must be based on a good faith planning process, and must be carried

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[2] "The property of no person shall be taken for public use, without just compensation therefore." Connecticut Constitution, Article I, §11.

out without pretext. The two cases that best illustrate these holdings are *AvalonBay Communities v. Town of Orange*, 775 A.2d 284 (Conn. 2001) (noted in the Petition, at 20), and the state court decision in *Kelo v. New London*, 843 A.2d 500 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

From 1997 through 2001, AvalonBay successfully challenged the Town of Orange's attempt to use eminent domain to block an affordable housing development.

In August 1997, AvalonBay filed an application with the Orange Town Plan and Zoning Commission for a permit to construct a 172 unit apartment home community on 9.6 acres of land. The town's zoning regulations permitted multi-family housing on the subject property.

AvalonBay's application, however, proposed that twenty-five percent[3] of the residential units be subjected to maximum rent restrictions that would keep the units within the economic reach of households earning less than eighty or sixty percent of the statewide median income. By doing so, AvalonBay brought its application under Connecticut's "affordable housing statute," Conn. Gen. Stat. §8-30g (2007). That statute, adopted in 1989 in response to a statewide affordable housing crisis,[4] provides that if a residential developer agrees to set aside a specified percentage of proposed units for low and moderate income families, a municipal zoning commission denies the permit application,

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[3]Since amended to thirty percent, *see* Connecticut Public Act 00-206.

[4]Connecticut Public Act 89-311, §2.

and the developer appeals to the Superior (trial) Court, the burden of proof shifts to the municipal agency to demonstrate to the court that each of its reasons for denial constitutes a "substantial public interest in health [or] safety" that "clearly outweighs" the need for affordable housing in the town and the region. Thus, in a §8-30g appeal, a municipal zoning commission's factual findings and conclusions are not accorded deference, as in traditional land use cases; commissions must prove to the court a compelling reason for denial. This statute thus provides applicants with a mechanism to alter or override zoning regulations that have the intent or effect of excluding low and moderate income families. *See generally, West Hartford Interfaith Coalition v. Town Council,* 636 A.2d 1342 (Conn. 1994) (one purpose of §8-30g is to facilitate amendments to restrictive zoning ordinances); *Quarry Knoll II Corp. v. PLanning and Zoning Commission,* 780 A.2d 1 (Conn. 2001) (explaining the burden-shifting mechanism and standards for burden of proof).

Orange is an affluent community whose housing stock is predominately single-family detached homes on large lots. The town is located west of New Haven along Interstate 95.

At the time of AvalonBay's application, Orange had a critical shortage of affordable housing: of approximately 4,700 residential units, only forty-five qualified as price-restricted or subsidized housing under the state's definition, and all of these units were age-restricted, and thus unavailable to families with children.

Despite this shortage of housing, and even though the subject property was located in a zone that permitted multi-family housing by special permit, local reaction

to AvalonBay's application was immediately hostile. The First Selectman led the charge, predicting at a public meeting that the proposed development would bring more than 100 new school-aged children to town, would require construction of a new $20 million school, and would result in higher taxes for existing residents and increased crime. An assistant police chief predicted that the development would generate criminal mischief, burglary, domestic violence, and other crimes.

In March 1998, while AvalonBay's land use permit application was pending before local agencies, the First Selectman announced the Town's intent to take the property by eminent domain. The First Selectman's clear intention was to use eminent domain to exclude low income families with school-age children who would reside in the AvalonBay development.

Several weeks later, the Board of Selectmen announced a proposal for a 172 acre "Orange Enterprise and Technology Park," that would encompass the AvalonBay nine acre property. At that time, the Town had never discussed any proposal for a technology park in this location, and had not conducted any study of need for or feasibility of a technology park in Orange.

In August of 1998, the Board of Selectmen hired a civil engineer to prepare a plan for the technology park. At the same meeting, the Board adopted a resolution appropriating $1.5 million to condemn the property.

In November 1998, voters defeated a referendum that would have authorized the $1.5 million for condemnation. In December, the Board adopted a second resolution to appropriate this amount again, for the same purpose. This time, the Selectmen better educated vot-

ers about the importance of stopping the AvalonBay development, making such comments as:

> When I think about this issue of the Avalon project, I hear a giant sucking sound. And it's the sound of our resources and tax dollars being sucked into paying for additional services which will be required for the 168 families in this apartment complex.

The First Selectman acknowledged that the goal of the condemnation was "to eliminate the Avalon proposal and replace it with an enterprise and technology park." The referendum appropriating $1.5 million passed on January 21, 1999. In March 1999, the Board of Selectmen gave final approval for the condemnation. AvalonBay brought an injunction to stop the taking.

Interpreting the takings clause of the state constitution, the Connecticut Supreme Court affirmed a trial court's entry of a permanent injunction, on the grounds of the lack of a *bona fide* planning process and plan for the use of eminent domain, and because the condemnation was pretextual – not for economic development as claimed, but to thwart an otherwise legitimate use of the subject property. 775 A.2d at 293-302.

With respect to the lack of a planning process or plan, the Connecticut court observed that the town had finalized its eminent domain resolution long before its technology park plan was completed, *id.* at 299; the plan itself was amply proven to be "hastily assembled, poorly envisioned, and incomplete," *id.* at 300; and while purporting to cover a 172 acre development, the plan was detailed with respect to only one parcel, the AvalonBay piece. *Id.* at 301. The court expressly noted

that *even though* the technology park plan on its face satisfied the essential statutory elements for municipally-sponsored economic development, *see* Conn. Gen. Stat. § §8-186 *et seq.* (municipal economic development – the same statutes at issue in *Kelo*), the *absence* of anything more than "the bare minimum amount of information and planning as to any future industrial park" rendered invalid the town's use of eminent domain to try to carry out that plan. *Id.* at 299. The court described the project plan as "a necessary component in effectuating a taking by eminent domain. . . ." *Id.* at 300.

The Connecticut court also invalidated the condemnation because the town's action was pretextual: its publicly-stated reason for using eminent domain was demonstrably false, and this alone was sufficient to invalidate the town's use of its sovereign power to condemn. The court credited the trial court's finding that the actual purpose of the condemnation was "to regain control of property that some statutes, such as the affordable housing statute, allegedly take away from municipalities." *Id.* at 299. Eminent domain was used "in bad faith and in furtherance of a plainly improper motive, namely, as a pretext to thwart what would otherwise be a legitimate use of property." *Id.* at 302. It is noteworthy that the Connecticut court did not focus on whether the town's *actual* motive was proper, but on whether its *stated* public purpose – facially valid or not – was pretextual.

With regard to the requirement of a *bona fide*, good faith plan and planning process, *Kelo* stands for the same principle. The Connecticut Supreme Court's opinion is replete with descriptions of and references to the City of New London's comprehensive planning process – public hearings, consideration of alternatives, numerous

plan revisions, supporting economic studies, etc. – as the foundation of a constitutionally sufficient exercise of eminent domain. 843 A.2d 508-11, 535-47.

In Connecticut, therefore, exercise of the sovereign power of eminent domain requires compliance with two procedures, as the Petitioners here have urged: a good faith plan, which by definition prevents an *ad hoc* use of eminent domain; and an accurately stated reason, not on that is pretextual, misleading, or dishonest.

B. Thus, Connecticut and New Jersey Are Split As To These Procedural Requirements For Use of Eminent Domain.

The decision of the New Jersey Supreme Court in *MiPro Homes* is dismetrically opposed to Connecticut's interpretation of the procedural requirements for eminent domain under the federal Takings Clause, in two respects.

First, the New Jersey courts have held that a municipality, in order to use eminent domain, need not have a plan or planning process for *either* its use of eminent domain, *or* its use of the land after it has acquired title. *Ad hoc* decisions to condemn are therefore permissible, as are condemnations with no prior contemplation of the use of the condemned land other than "saving it" from some disfavored use. Mount Laurel Township simply did not need to have a plan to use the condemned land. Moreover, it did not matter to the New Jersey courts that the condemnation not only was not consistent with any plan, but was contradictory to the township's existing open space acquisition plan.

Second, the *MiPro Homes* decisions hold that whether the asserted reason for condemnation is accurate or hon-

est is irrelevant, so long as one underlying result is valid. In this case, although the township argued, and the New Jersey courts agreed, that preserving open space and preventing development are two sides of the same coin, the fact remains that the township *stated* that it was using eminent domain *specifically* to preserve open space, but it concluded that this purpose was *incidental* at best to the real reason, which was avoiding perceived impacts of residential development, claimed to be additional public school children, traffic, and pollution (as though these were self-evident impacts).

Had AvalonBay's case against the Town of Orange, Connecticut arises in New Jersey, the result would have been different: Orange condemned AvalonBay's land purportedly for economic development. As we know from *Kelo*, the Connecticut legislature and its citizens have a "strong and sustained interest" in municipal economic development and a detailed statutory framework [Conn. Gen. Stat. §§8-186 *et seq.*] that supports such purposes. Connecticut's interest in and statutory support of municipal development thus parallels the interest of New Jersey's legislature and citizens in open space, as described in the New Jersey Supreme Court's opinion, Petition Appendix at 1a. But the fact that Orange used eminent domain to take the AvalonBay parcel without a plan in place to effectuate economic development, and contrary to its own zoning regulations, would be of no moment in New Jersey, because *MiPro Homes* holds that a plan was unnecessary.

Similarly, the pretext argument that AvalonBay successfully advanced in Connecticut would be rejected in New Jersey. Under *MiPro Homes*, the fact that a township's stated reason for emiment domain is not the actual reason is of no consequences.

Thus, New Jersey courts have stated their willingness to countenance the exercise of eminent domain in ways that would be ruled unconstitutional in Connecticut.

C. This Split Between Connecticut and New Jersey, and Among Other Courts, Implicates Directly Whether the Deference to Condemning Agencies That Was Reaffirmed in *Kelo* Has Any Limits, and Must Be Resolved.

The Petition, at 16-20, amply documents that this split between the Connecticut and New Jersey courts regarding whether the use of eminent domain rests on procedural requirements of a good-faith plan and the absence of pretext extends to at least four federal circuits and seven states. In this sense, the Petition has amply documented the breadth and gravity of the split: it is nationwide, and the courts are certainly "splintered" in their interpretation of these procedural requirements for eminent domain. The issue is well developed for this Court's review.

But what should motivate this Court to grant the instant Petition is the importance of the issue on which these courts are divided. AvalonBay respectfully submits that *the issue is no less than the procedural prerequisites — the underpinnings, the foundational requirements — to the substantial deference to legislative determination of public use, public purpose, and public benefit that this Court reaffirmed in Kelo.* In other words, this Court's *Kelo* opinion makes it clear that its affirmation of judicial deference to the conclusions of the City of New London and its economic development agency *were rooted in the city's and the agency's comprehensive planning process and crafting of a good faith plan both*

prior to and during the decision to use eminent domain. See, e.g., 545 U.S. at 472-75, 483-84, 487-89. Justice Kennedy, concurring in *Kelo, id.* at 493, summarized the majority view:

> This taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression, and the projected economic benefits of the project cannot be characterized as *de minimus* . . . The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purpose.

In so stating, Justice Kennedy, like the majority, drew upon the fact that other seminal eminent domain decisions of this Court, *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), were based also on detailed public planning processes and redevelopment plans.[5] 545 U.S. at 492-93.

If eminent domain may be utilized without a plan, and notwithstanding pretext, then, as Justice Kennedy

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[5] Even this Court's regulatory takings/inverse condemnation jurisprudence is founded on planning requirements. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) sets forth a three-factor analysis for regulatory takings, including reasonable, investment-backed expectations, which are founded on the existence or not of a government's plan for land use; and the "character of the governmental action," which in part examines whether government regulation is consistent with or contrary to government land use policies. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the temporary moratorium that this Court sanctioned was the result of a public planning process. And the so-called *Nollan/Dolan* test (*Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)) for exactions requires a demonstration of nexus and proportionality between a permit condition and a governmental plan.

warned, *id.* at 493, judicial review of the public use question – long-recognized as a judicial function – will be undermined. Put another way, because *Kelo* clearly holds that deference to New London's legislative body was appropriate because its use of eminent domain was founded on a comprehensive and public planning process, how can the state court result in *MiPro Homes* stand, when the procedural underpinnings present in *Kelo* were absent in the New Jersey process? And as Professor Gideon Kanner recently put it, "[Once] we say that the public nature of the taking trumps improper municipal motivations, there is no telling where that can take us." G. Kanner, "What Does It Take To Recognize Bad Faith?" Just Compensation, Dec. 2006 at 12.

One other aspect of the *MiPro Homes* decision warrants granting of the Petition. New Jersey Justice Rivera-Soto was correct in pointing out that traditional just compensation rules will compensate MiPro Homes only for the value of its land as subdivided, but not for its hundreds of thousands of dollars of good-faith investment in residential development in reliance on Mount Laurel Township's stated open space acquisition plan, which did *not* target the subject parcel. Short of altering what is compensable as just compensation in eminent domain cases, forcing municipalities to adopt and follow good-faith planning processes prior to using eminent domain mitigates if not prevents property owners from incurring substantial but non-compensable expenditures in reliance on existing governmental land use plans.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: May 4, 2007

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